87-793

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD A. SHAW

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Was the First Circuit correct when it ruled that a trial court's conclusion that a defendant's absence from trial was voluntary did not demonstrate an abuse of discretion and would not be overturned unless clearly erroneous where the trial court failed to conduct an evidentiary inquiry into the defendant's absence?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Richard A. Shaw, respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 10, 1987.

OPINION BELOW

The opinion below was unreported *sub nom United States v. Richard A. Shaw*, No. 85-1723 (1st Cir. 1987).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on July 20, 1987. An application for an enlargement of time within which to petition for rehearing was granted on August 5, 1987 and the petition for rehearing was timely filed on August 19, 1987. The United States Court of Appeals for the

First Circuit denied the petition for rehearing on September 10, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

FEDERAL RULE OF CRIMINAL PROCEDURE 43.

See Appendix II.

STATEMENT OF THE CASE

Petitioner, Richard A. Shaw, was indicted along with four co-defendants, Gregory P. Smith, Douglas Morgan, John E. Singleton and Alfred M. Sarno, for conspiracy to receive, sell, and dispose of stolen securities that had been transported in interstate commerce, as well as the substantive offenses of receipt of stolen securities and the interstate transportation of stolen securities in violation of 18 U.S.C. Sections 371, 2314 and 2315. Mr. Shaw was convicted on all counts against him. Singleton was convicted on all counts against him; Sarno was convicted on four counts and acquitted on four counts; and a mistrial was declared as to Morgan after the jury failed to reach a verdict as to him.

The trial commenced on June 30, 1985. On July 8, 1985, Mr. Shaw's co-defendant, Douglas Morgan, failed to appear for trial. Counsel for Morgan noted that his client — who had never previously failed to appear — was missing without any explanation. The trial judge stated that he could "see no reason why we can't continue the trial under Rule 43, once the trial has begun, [if] the defendant voluntarily absents himself." Morgan's counsel then stated to the court that, based upon the information both he and Morgan's family had been able to gather, it was their conclusions that Morgan was not voluntarily absent, that they were concerned about foul play, and that they had notified the local police, who had commenced a search. 10 Tr. 1-2.

The trial judge then stated:

> If, in fact, it turns out that he did not voluntarily absent himself, then, of course, I would order a new trial and he

> could start all over again. But given that there is only one day left, and given the fact that there is no clear evidence to me that he is involuntarily absent. I will invoke the provisions of Rule 43 and we will proceed without Mr. Morgan.

10 Tr. 6. Based upon the prejudice arising from the inference of guilt which would inure to Mr. Shaw and all defendants from Mr. Morgan's sudden and unexplained absence, counsel for Mr. Shaw moved for a mistrial. The motion was denied. 10 Tr. 7-8.

As noted in the First Circuit's opinion, Mr. Morgan's body was found in October, 1985. He had been murdered.

On appeal, Mr. Shaw argued, *inter alia*, (i) the trial court erred in denying his motion for a mistrial because the court has no basis for finding that Morgan's absence was voluntary, and (ii) Shaw was additionally prejudiced because Morgan was vital to his defense and Shaw had intended to call him as a witness on his behalf. The First Circuit summarily dismissed the latter argument. As to the former, the First Circuit held that, because it was within the court's discretion to proceed, and the record did not indicate an abuse of that discretion, the trial court's finding of Morgan's voluntary absence was not clearly erroneous. *United States v. Shaw*, No. 85-1723, slip op. at 5 (1st Cir. 1987).

REASONS FOR GRANTING THE WRIT

BECAUSE THE TRIAL COURT FAILED TO CONDUCT A REASONABLE INQUIRY INTO THE QUESTION OF WHETHER A CO-DEFENDANT WAS VOLUNTARILY ABSENT, THE FIRST CIRCUIT'S CONCLUSION THAT THE TRIAL COURT'S DECISION TO PROCEED WITH TRIAL WAS NEITHER AN ABUSE OF DISCRETION NOR CLEARLY ERRONEOUS WAS UNSUPPORTED BY THE RECORD.

The rules against trials *in absentia* were designed to protect the defendant's, not the government's, rights. *United States v. Lockwood*, 382 F. Supp. 1111, 1115-16 (D.C. Cir. 1974), *citing Snyder v. Massachusetts*, 291 U.S. 105, 106 (1934). The applicable rule at bar, Federal Rule of Criminal Prodedure 43, provides in pertinent part:

Rule 43. Presence of the Defendant.

> (a) Presence Required. The defendant shall be present at the arraignment at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> > (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial).
> >
> > . . .

Federal Rule of Criminal Procedure 43 (West 1987). The First Circuit relied heavily upon *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982) for its holding that the finding by the district court of voluntary absence by a defendant would be upheld unless clearly erroneous. The First Circuit concluded that the

trial judge's finding of voluntary absence was not clearly erroneous, nor was it an abuse of discretion to have proceeded with the trial. The precedential support for *Lochan*, however, is *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977). In *Pastor*, however, the district court had conducted an evidentiary hearing to examine the circumstances of Pastor's absence and the Second Circuit's holding, that a finding of voluntary absence would not be overturned unless clearly erroneous, was based upon such proceeding, i.e., a hearing in which the court could evaluate the evidence of absence, the witnesses' credibility and the circumstances surrounding the defendant's absence. *Pastor*, *supra*, 557 F.2d at 933. The rationale for the necessity of such a proceeding is found in *Taylor v. United States*, 414 U.S. 17 (1973), wherein this Court decided the constitutionality of Federal Rule of Criminal Procedure 43, noting that, while the rule guarantees the defendant's right to be present at every stage of the trial, that right may be *waived* by the defendant's voluntary absence. Indeed, all the cases which address proceeding *in absentia* pursuant to Rule 43, analyze the issue in terms of waiver. *See, e.g., United States v. Londono*, 659 F. Supp. 984 (E.D.N.Y 1987). In *Londono*, the court noted:

> A defendant may knowingly and intelligently waive his sixth amendment right to be present at his trial, *United States v. Sanchez*, 970 F.2d 248 (2d Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 584, 93 L.Ed. 2d 587 (1986), by voluntarily and deliberately absenting himself from the trial without good cause, *United States v. Pastor*, 557 F.2d 930, 933 (2d Cir. 1977). It must clearly appear in the record . . . that the defendant . . . voluntarily, knowingly, and without justification, failed to be present at the designated time and place before the trial may proceed in his absence.

United States v. Londono, *supra*, 659 F. Supp. at 985. *See also United States v. Schocket*, 753 F.2d 336, 339 (4th Cir. 1985); *United States v. Lochan*, 674 F.2d 960, 967 (1st Cir. 1982); *United States v. Benavides*, 596 F.2d 137, 139 (5th Cir. 1979); *United States v. Cureton*, 396 F.2d 671, 675 (D.C. Cir. 1968). *See generally*, Annot., 21 A.L.R. Fed. 906 (1968). Implicit in the

requirement of showing knowledge and voluntariness on the part of the absent defendant, thereby establishing "waiver" of his right to be present, are findings of fact based upon evidence which support such conclusions. Once the voluntary absence of the defendant is determined, the trial court must then determine whether mistrial or severance is the appropriate remedy given the circumstances of the case. *United States v. Lochan*, 464 F.2d 960, 967-68 (1st Cir. 1982); *United States v. Benavides*, 596 F.2d 137, 139-40 (5th Cir. 1979); *United States v. Pastor*, 557 F.2d 930, 934 (2d Cir. 1977). Until the threshold question of voluntary or involuntary absence is addressed, however, the impact and implications of the defendant's absence on his co-defendants and the balance of those proceedings cannot and should not be addressed.

In the case at bar, the court's inquiry into the reasons behind Morgan's absence was cursory, to say the least, consisting merely of a brief inquiry of counsel and representations by counsel — representations which indicated that Morgan's absence was, indeed, *not* voluntary. 10 Tr. 1-2, 6-8. This scant inquiry into the reasons for Mr. Morgan's absence clearly contravened the principles codified by Federal Rule of Criminal Procedure 43 and the cases which interpret that rule, all of which were well known to the trial court. The failure to go beyond mere representations of counsel and conduct a more searching inquiry by way of evidentiary hearing resulted in a finding of voluntary absence, which was, itself, clearly erroneous.

The impact of Morgan's sudden unexplained absence at such a late stage of the proceedings inevitably affected the trial strategy of the remaining co-defendants. Moreover, the unexplained absence of a co-defendant as trial is drawing to a close, would clearly give rise to the inference that Morgan's absence was due to his fear of imminent conviction, an inference which must have colored the jury's perception of Mr. Shaw and the remaining co-defendants. By the trial court's failure to observe the provisions of Federal Rule fo Criminal Procedure 43 and the cases in the various circuits interpreting that rule, its subsequent decision to proceed in Morgan's absence forced Shaw and

his co-defendants to proceed with a trial strategy which had been predicated upon the continued presence of all co-defendants. Although the Rule 43 violation did not directly involve Mr. Shaw, the result of that violation clearly inured to his detriment. The First Circuit's disregard of the failure of the trial judge to conduct a proper Rule 43 inquiry violated existing precedent in other circuits and should not be permitted to stand.

CONCLUSION

Petitioner, Richard A. Shaw, requests that a writ of certiorari issue to the United States Court of Appeals for the First Circuit. He further requests that this Court vacate his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

JOSEPH F. LAWLESS, JR., ESQUIRE, counsel of record for petitioner, and a member of the bar of the Supreme Court of the United States, hereby certifies that three true and correct copies of the Petition for Writ of Certiorari attached hereto have been served upon the following individuals, postage prepaid:

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APPENDIX

APPENDIX I

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1723

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD A. SHAW,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, *U.S. District Judge*]

Before: Bownes, Breyer and Torruella, *Circuit Judges*.

Richard A. Shaw on brief pro se.

Martin F. Murphy, Assistant United States Attorney, and *Frank L. McNamara, Jr.*, United States Attorney, on brief for appellee.

July 20, 1987

BOWNES, *Circuit Judge*. This is a *pro se* appeal by defendant-appellant Richard A. Shaw from a jury conviction of conspiracy to receive, sell and dispose of stolen securities that had been transported in interstate commerce. Shaw also was convicted of the substantive crimes of receipt of stolen securities and the interstate transportation of stolen securities.

Defendant was tried along with codefendants John E. Singleton, Gregory P. Smith, Douglas Morgan, and Alfred M.

Sarno. The jury found Shaw guilty on all eight counts charged against him. Singleton was convicted on all counts charged against him; Sarno was convicted on four counts and acquitted on four; there was a mistrial declared as to Morgan after the jury failed to reach a verdict.

Four issues are raised by defendant on appeal: (1) that the district court invaded the jury's fact-finding responsibility by its jury instructions; (2) that the trial court abused its discretion by invoking Federal Rule of Criminal Procedure 43 as to defendant Morgan; (3) that the court improperly allowed attorneys and material into the jury room during deliberations; and (4) that the indictment was defective. We discuss the issues in their chronological order.

THE INDICTMENT

Defendant attacks the indictment on three grounds: (1) that the conspiracy count (I) is duplicitous because it charges a violation of two statutes, 18 U.S.C. §2315, the receipt of the stolen securities which have moved interstate, and 18 U.S.C. §2314, the interstate transportation of stolen securities; (2) that the substantive counts (II—VIII) "are fatally defective because each count incorporates and realleges paragraphs 1-7 of count one, the conspiracy count"; and (3) that all counts are defective because they fail to allege "unlawful fraudulent intent."

None of defendant's contentions has any merit. It has long been established that

> [t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U.S. 204, 210; *Ford* v. *United States*, 273 U.S. 593, 602; *United States* v. *Manton*, 107 F.2d 834, 838.

Braverman v. *United States*, 317 U.S. 49, 54 (1942). *See also United States* v. *Thomas*, 774 F.2d 807, 812-13 (7th Cir. 1985), *cert. denied*, *sub. nom. Troutman* v. *United States*, 106 S. Ct. 1218 (1986). *United States* v. *Morrow*, 717 F.2d 800, 804 (3d Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

Federal Rule of Criminal Procedure 7(c) states specifically: "Allegations made in one count may be incorporated by reference in another count."

The conspiracy count alleged that the named defendants did

> *knowingly and unlawfully combine*, conspire, confederate and agree to receive, sell and dispose of securities of a value in excess of $5,000 which were moving as, part of and constituted interstate and foreign commerce, *knowing such securities to have been stolen*, unlawfully converted and taken; and to transport in interstate commerce securities of a value in excess of $5,000, knowing the same to have been stolen and converted, in violation of Title 18, United States Code, §§ 2315 and 2314. [Emphasis added.]

Each of the substantive counts (II-VIII) described the actions of the defendants with regard to the securities and then stated, "knowing the same to have been stolen, unlawfully converted and taken." Although the words "unlawful fraudulent intent" were not explicitly used, they were clearly encompassed within the language used.

Defendant's challenge to the indictment fails.

THE RULE 43 ISSUE

One of Shaw's codefendants, Douglas Morgan, failed to appear in court on the ninth day, July 8, 1985, of the twelve-day trial. Morgan's body was found in October 1985; evidently he had been murdered. Shaw last saw Morgan at a bar in Norwood, Massachusetts. Morgan was accompanied by an older man with whom he left. When Morgan failed to appear, the court issued a bench warrant for his arrest, found that his absence was voluntary, invoked the provisions of Federal Rule of Criminal Procedure 43(b)(1) and proceeded with the trial.

Federal Rule of Criminal Procedure 43 provides in pertinent part:

> **Rule 43. Presence of the Defendant**

> (a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> > (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial),
> >
> > . . . .

Defendant contends that he was entitled to a mistrial because the court had no basis for finding Morgan's absence was voluntary. Defendant also argues that Morgan was a vital witness and that he intended to call Morgan as a witness in his behalf.

We note first that defendant never suggested to the trial court that Morgan would be called as a witness, nor was any offer of proof made as to Morgan's purported testimony. We view the Morgan-witness assertion as an attempt to take advantage of Morgan's demise and reject it out of hand.

Secondly, the law is clear that in a multidefendant case, the trial judge has discretion to determine whether the trial should be adjourned or proceed. *United States* v. *Peterson*, 524 F.2d 167, 185 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States* v. *Tortora*, 464 F.2d 1202, 1210 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). In *United States* v. *Lochan*, 674 F.2d 960 (1st Cir. 1982), we held that a finding by the district court of voluntary absence by a defendant would be upheld unless clearly erroneous and that it is within the trial court's discretion to determine whether in a multidefendant case there should be a continuance of severance where one defendant has absented himself from the trial. *Id.* at 967-68. Here, the district

court's finding of voluntary absence by Morgan was not clearly erroneous, nor was it an abuse of discretion to proceed with the trial.

Appellant's Rule 43 contentions are rejected.

THE JURY INSTRUCTIONS

Defendant claims that by its charge to the jury the district court violated its fifth amendment right to due process and his sixth amendment right to a fair trial. This claim rests on portions of the instructions which are incompletely quoted in appellant's brief. The complete sections of the pertinent jury instructions are as follows:

> If you are convinced that the government has proven each element as against a particular defendant on a particular charge, then you must find the defendant guilty of that charge. If you're not so convinced, then you must find him not guilty.
>
> So, in summary, if you find that the government has proven that: One, there was a conspiracy; two, that the defendant — and I will talk about the defendant in the singular, you understand you will have to consider that as to each — willfully, that is intentionally, and with knowledge joined the conspiracy; and, three, that one of the conspirators committed one of the overt acts, then you must find the defendant guilty.
>
> If you do not find each of the three elements as to any particular defendant, then that defendant cannot be found guilty and you will have to find him not guilty.
>
> So, again, with respect to the substantive counts, if you find that the government has proven: One, that the bonds were stolen; two, that the defendant knew they were stolen; three, that the bonds had a value of more than $5,000; and four, that they were received, with respect to Counts 2 and 6, still being in interstate commerce; or with respect to the remaining counts, transported in interstate commerce,

> then you must find the defendant guilty on the substantive count that you are then considering.
>
> If you find any element missing, then you cannot find the defendant guilty as to the charge as to which you find the element missing.

Appellant's brief fails to quote the last sentences of each of the instructions.

These instructions did not, as appellant argues, effectively direct a finding of guilt against him. They can only be read as telling the jury that if the government proved each and every element of the crimes charged against the defendant, if should return a verdict of guilty *but* if any of the elements were not so proven, the defendant should be found not guilty. The finding of guilt or innocence was expressly left to the jury. *See Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947).

In reviewing jury instructions, we must examine them in the context of the charge as a whole. *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). And, because there was no objection below to the instructions, the plain error standard applies. *Unites States* v. *Coady*, 809 F.2d 119, 123-24 (1st Cir. 1987); Fed. R. Crim. P. 52. Before giving the instructions now attacked, the district court carefully instructed the jury on the presumption of innocence, the government's burden of proof, and told the jury that no inference could be drawn from the failure of a defendant to testify. We find no error in the instructions, plain or marginal.

We have considered the cases cited by the appellant and find them inapposite. In *Cooper* v. *United States*, 218 U.S. 39 (D.C. Cir. 1954), the issue was not jury instructions but whether the district court should have granted defendant's motion for judgment of acquittal. The court of appeals held that the motion should have been granted. In *Mims* v. *United States*, 375 F.2d 135, 147 (5th Cir. 1967), the jury was instructed that the evidence showed as a matter of law that there was an attempt made to rob the bank. This was patently an invasion of the jury's fact-finding function; there was no such invasion here. In *United*

States v. *Hawyard*, 420 F.2d 142 (D.C. Cir. 1969), a criminal defendant accused of murder proffered an alibi defense that he was absent from the scene of the crime when the killing occurred. The trial judge instructed the jury that if the government proved beyond a reasonable doubt that the defendant was present at the scene of the crime when the killing took place, then he *must* be found guilty. The D.C. Circuit reversed defendant's conviction because the trial court's instructions encroached severely upon the jury's fact-finding function. Unlike the instant case, the trial court's instructions completely nullified the jury's duty to find that the prosecution had proven each and every element of the crime charged. We agree that it is reversible error for a trial court to instruct that a defendant must be found guilty if his alibi defense fails; the weakness of a defendant's alibi does not negate the prosecutor's affirmative duty to prove every element of the offense beyond a reasonable doubt. Here, the trial court's instructions fully communicated to the jury that it could find the defendant guilty only if the government proved every element of the crime beyond a reasonable doubt. We recognize that a jury may acquit a criminal defendant even if the prosecution has proven every element of its case beyond a reasonable doubt and the defendant has not interposed a viable defense. "For a judge may not direct a verdict of guilty no matter how conclusive the evidence." *Brotherhood of Carpenters* v. *United States*, 330 U.S. at 408. It is perhaps technically more accurate for a trial judge to instruct the jury that it *should* find the defendant guilty if the government proves its case beyond a reasonable doubt rather than it *must* do so. But the use of the word "must" here, instead of "should," does not warrant reversal since the instructions did not direct a verdict of guilty or encroach upon the jury's fact-finding function.

THE JURY DELIBERATIONS

Appellant claims that his due process rights under the fifth amendment were violated because the district court allowed the prosecutor and Attorney Sussman, counsel for defendant Sarno,

into the jury room "during the course of the Jury's deliberations." Appellant also asserts that the court erred in allowing a videotape machine to be used by the jury to play tapes of meetings between Sarno and an FBI informant and an FBI undercover agent. Finally, appellant contends that the tapes used by the jury contained material that had been excluded from evidence.

None of these claims has any support in the record. We recount what actually took place. During the course of its deliberations, the jury asked if it could use the videotape machine to view the tapes admitted against defendant Sarno. After consulting with counsel, the court stated:

> THE COURT: We understand Mr. Egan and Mr. Powers [FBI agents] will install the equipment, Mr. Denniston [prosecutor] and Mr. Sussman [Sarno's counsel] will be there. The jury will vacate the jury room while it is being installed and move to the adjoining jury room. And once it's finished, in the presence of Mr. Denniston and Mr. Sussman, Mr. Powers will explain the use of the equipment and the jury will be left to run it and to continue its deliberations.

The court then addressed the attorney directly:

> Is that agreeable, Mr. Sussman?
>
> MR. SUSSMAN: Yes.
>
> THE COURT: Mr. Denniston?
>
> MR. DENNISTON: Yes, your Honor.
>
> THE COURT: Do you object?
>
> MR. CHAPMAN: [Defendant Shaw's counsel] Is it permissible — I just came back from my office. I'd like to go back.
>
> THE COURT: Where is your office?
>
> MR. CHAPMAN: Over in Chelsea. It would take ten minutes to get here.

> THE COURT: That's too long. I don't want to wait that long when the jury has a question. If you get stuck in traffic, then we have a problem. I really prefer you to stick around. I'm sorry.
>
> MR. CHAPMAN: That's all right. I'll go downstairs and eat.

The jury was carefully instructed that the tapes to be viewed were admissible only against the defendant Sarno. And finally, there is nothing in the record to support appellant's claim that the tapes viewed by the jury contained materials that had been excluded from evidence.

Although we have serious doubts as to appellant's standing to challenge the videotape viewing by the jury, it is abundantly clear that the procedure followed by the court, which was the result of consultation with all counsel, did not adversely affect or prejudice the rights of any of the defendants.

We have carefully read the complete trial transcript and find no errors in the district court's rulings or instructions that were prejudicial to appellant. Appellant received a fair trial; the evidence was more than sufficient for a conviction.

Affirmed.

APPENDIX II

Federal Rule of Criminal Procedure 43.
Presence of the defendant

(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence not required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendent's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.